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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-6373

ABRAHAM FIELDS,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

BRIEF AND APPENDIX IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-6373

ABRAHAM FIELDS,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

BRIEF AND APPENDIX IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Superior Court of New Jersey, Appellate Division is attached hereto as Appendix A. The opinion of the Supreme Court of New Jersey denying certification appears in 64 *N.J.* 308, (1973). (Pal).

COUNTER-STATEMENT OF THE CASE

Pursuant to Supreme Court Rule 40-3, respondent, State of New Jersey, respectfully submits the following additions and corrections to Petitioner's Statement of the Case:

Petitioner Abraham Fields and co-defendant Thomas Hines were indicted by the Hudson County Grand Jury on July 14, 1971 in Indictment No. 1093-70 charging them with separate counts of felony murder, premeditated murder and armed robbery. On December 9, 1971 co-defendant Hines retracted his former plea of not guilty and entered a plea of *non vult*. (See T2.2-10 et seq). Jury trial of petitioner Abraham Fields commenced on December 8, 1971. The State's proofs indicated that on October 24, 1970 at approximately 9:30 P.M. two black men wearing grey masks and armed with guns entered the L & M Delicatessen in Jersey City, New Jersey and announced an armed robbery. (T3.35-9 et seq). Anna Levine, the cashier, was behind the counter near the register waiting on a customer (T3.50-6); William Wheeler, an employee, was at his post next to the counter (T3.59-10); Harry Milstein, the owner, was behind the counter in the rear (T3.35-13); and Faival Zaczepinski, another employee, was shelving cans in the back of the store. (T3.37-8).

The taller culprit remained at the entrance of the store with his gun drawn while the shorter of the two walked around to Anna Levine, placed a gun against her chest, and told her: "Don't fight. Don't give no argument. I won't hurt you." (T3.50-8). He then shoved Mrs. Levine out of his way. (T3.50-12). She stumbled and was led to the rear of the store by a woman customer. (T3.51-10).

At that moment Zaczepinski ran from the back of the store toward the man at the front. (T3.51-20). As he reached the man, first a click sounded and then two shots rang out and Zaczepinski slumped toward the floor. After the shooting the smaller man grabbed the money from the exterior tray of the register and leaped over the counter. (T3.66-19). As he passed by the wounded Zaczepinski, he shoved him to the floor. (T3.67-5). Both men fled from the store.

The police arrived shortly thereafter with an ambulance and Zaczepinski was rushed to the Jersey City Medical Center. At approximately 10:00 P.M. he was brought into the emergency room where he was treated by Dr. Fred Sachs. He had two gunshot wounds of the upper abdomen and was in shock. (T5.4-16). In order to stabilize his condition to permit surgery, it was necessary to administer blood transfusions. Initially, four units were administered, but during the next two days, because of the quantity of blood he had lost, sixteen additional transfusions were necessary. That night an operation was performed which

abated the hemorrhaging. The victim stopped breathing twice on the operating table and his precarious condition limited exploratory surgery. The bullets were never removed. (T5.8-3 et seq).

Despite the injuries and complications, Zaczepinski survived and by November 15, 1970 had recovered sufficiently to be released from the hospital. Dr. Sachs remained the victim's physician during the next few months.

In early January, Zaczepinski came to the doctor's office with complaints of trembling. The doctor noted a coarse tremor to the hand and sent him to Dr. Valergakis for a neurological examination. Three or four days later, when Dr. Valergakis examined him, jaundice was obvious and the decedent was rehospitalized. Examinations by Dr. Sachs and Dr. Cangemi revealed the presence of a fulminant type of hepatitis. A few days later Faival Zaczepinski was dead. (T5.11-6).

The trial of this case consumed approximately twelve trial days. Harry Milstein, Anna Levine and William Wheeler testified for the State, describing the incident of October 24, 1970. Coats worn by the robbers were identified as well as the weapons used. However, on account of the masks they were unable to make a positive identification of the participants. (T3.36-1; T3.49-10; T3.58-24).

James "Sugar" Henry testified that he was with Thomas Hines and Abraham Fields during the afternoon and evening of October 24, 1970, at Hines' father's home. (T4.78-9). At that time Thomas Hines had borrowed his coat and Fields had borrowed a coat belonging to Melvin Hines, Thomas' brother. Both of the men were wearing these coats at about 8:45 P.M. when Sugar saw them, but Thomas Hines returned without his at about 1:00 A.M. Henry identified both coats, which had been previously identified as the coats worn by the robbers, as those borrowed by Hines and Fields.

Prior to this trial Thomas Hines had entered a plea of *non vult* to murder pursuant to an agreement that the State on sentencing day would recommend a maximum sentence of twenty years and would move to dismiss the two remaining counts of the indictment as well as another indictment and two complaints. Hines further agreed to testify for the State.

Hines testified that he and Abraham Fields were together on

October 24. (T6.137-13). In the afternoon they were at his father's home where he borrowed a coat from Sugar Henry. Fields put on a coat which belonged to Melvin Hines. (T6.139-2).

They left the house at about 9:00 P.M. wearing the coats and went to Dwight Street and Jackson Avenue. (T6.142-1). They each had a pistol and a stocking. There they briefly watched the L & M Delicatessen and decided to rob it. He explained how they stood in the doorway and put the stockings over their faces, took out their guns, and entered the store. (T6.142-5). Once inside they announced the holdup, and Fields went behind the counter to the register. While Fields was getting the money, Hines stood by the door with his gun drawn. Fields' gun was not loaded, but Hines' gun had five bullets in the chamber. (He kept it on an unloaded chamber to avoid accidental injury).

Hines testified that, as he was standing there, someone suddenly rushed at him with what at a glance he thought was a knife. (T6.142-19). He pulled the trigger once, the gun clicking at the empty chamber, and then fired two shots into the man who stumbled back. He turned quickly to go out, holding the door for Fields. Fields leaped the counter and knocked the man Hines had shot to the ground. They both fled up Dwight Street to a friend's house where they left the coats. (T6.143-10). They split up the money and then, hearing sirens throughout the neighborhood, the two men hid in a cellar where they also secreted the guns. (T6.143-18).

After about half an hour Fields left and went to Simp's Tavern. Hines waited another half an hour, went to his father's house and then went home. On February 18, 1971, after he was arrested Hines gave a confession to Detective Robert Worthy of the Jersey City Police Department. (T6.164-12).

Detective Worthy was among a number of police officers who testified for the State. He testified that he became involved in the investigation when he was contacted by an informer on October 29 and given a 7.65 German automatic hand gun (identified as the weapon used by defendant). (T7.68-16). The following day, he was led by the informer's information to a cellar where he also recovered both coats in evidence.

On February 13, 1971, the detective arrested Thomas Hines and, based upon his confession, on March 1 arrested defendant.

Defendant gave a voluntary statement admitting his participation in the crime along with Thomas Hines.[1]

The two coats and the gun were admitted into evidence as well as a button found at the scene which matched a button missing from the coat worn by Hines.

Four medical experts testified on behalf of the State: Dr. Fred Sachs, Dr. Asher Yaguda, Dr. John Bedrick, and Dr. Edwin Albano. Each of these witnesses opined that Faival Zaczepinski had died as a result of serum hepatitis which stemmed from the transfusions administered on and after October 24, 1970. (T5.22-19; T5.53-18; T7.27-3; T10.10-6).

Dr. Joseph Bellamy testified for defendant. He indicated that, based upon the facts as revealed, he could not exclude the possibility of infectious hepatitis developing from an independent source between the time of the transfusions and the victim's death. (TT9.178-17).

Defendant took the stand in his own defense. He contended that on the date of the robbery he was at his grandmother's house watching television. (T19.1). He had been with Hines earlier at Simp's Tavern but had left his company at about 7:00 P.M. His alibi was corroborated by the testimony of Mrs. Anna Smith, his grandmother. (T12.8-2).

On December 23, 1971 the jury returned a verdict of guilty of felony murder. Petitioner Fields was subsequently sentenced to life imprisonment at the New Jersey State Prison. A timely Notice of Appeal was filed to the Superior Court of New Jersey, Appellate Division and on September 6, 1973 that court affirmed the judgment of conviction and sentence imposed thereon. See Appendix A, *infra*. Fields then petitioned to the Supreme Court of New Jersey for writ of certification, but the Court denied the petition on November 27, 1973. (Pa1).

On or about March 1, 1974 Petitioner moved before this Court for leave to proceed *in forma pauperis*, and his *pro se* Petition for Certiorari was docketed on March 8, 1974.

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[1] Prior to police testimony concerning defendant's confession a *voir dire* was held. Defendant took the stand and contended that the statement had been beaten out of him. The trial court found the statement voluntary and admissible.

REASONS FOR DENYING THE WRIT

POINT I
THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL.

Petitioner asserts that the trial court erroneously denied his Motion for Judgment of Acquittal, alleging that the State's proofs at trial failed to established the casual relationship between the victim's wounds suffered during the armed robbery and his subsequent death from hepatitis. He asserts (without attempting to support the argument) that this issue presents an important question of federal law which should be reviewed by this Court. The respondent, State of New Jersey, respectfully submits that it met its burden of proof and that the trial court properly denied the defense Motion for Judgment of Acquittal in accordance with New Jersey law. Moreover, since petitioner fails to raise a federal question of substance and there are no special or important reasons for granting certiorari raised by this issue, it is submitted that the petitioner has not presented an issue cognizable on writ of certiorari as specified in *R.*19 of the Supreme Court Rules.

It is elementary law in New Jersey that the trial court, in determining the merits of a motion for judgment of acquittal pursuant to *Rule* 3:18-1, must determine whether, considering the State's evidence in its entirety, and giving the State the benefit of all favorable testimony, as well as all of the inferences that can be reasonably drawn therefrom, a jury could find defendant guilty of the crime charged beyond a reasonable doubt. See *State v. Reyes*, 50 *N.J.* 454, 458-59, 236 *A.2d.* 385 (1967); *State v. Coleman*, 46 *N.J.* 16, 45, 214 *A.2d.* 393 (1965), *cert.* denied 383 *U.S.* 950 (1966); *State v. Fiorello*, 36 *N.J.* 80, 174 *A.2d.* 900 (1961), *cert.* denied 368 *U.S.* 82 (1962). This rule of law is identical to the procedure followed by the federal courts. Rule 29 of the Federal Rules of Criminal Procedure. See, *e.g.*, *United States v. Mallory*, 460 *F.2d.* 243 (10th Cir. 1972), *cert.* den. 409 *U.S.* 870 (1972); *United States v. Moler*, 460 *F.2d.* 1273 (9th Cir. 1972); *Goff v. United States*, 446 *F.2d.* 623 (10th Cir. 1971); *Brandom v. United States*, 431 *F. 2d.* 1391 (7th Cir. 1970), *cert.*

den. 400 *U.S.* 1022 (1971). If the evidence, when weighed most favorably from the Government's point of view, is sufficient to sustain a conviction, the verdict must be affirmed. See *Glasser v. United States*, 315 *U.S.* 60 (1942) and *Weiler v. United States*, 323 *U.S.* 606 (1945). Only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt, may an appellate court overturn the verdict. *Brandom v. United States, supra* at 1400.

Contrary to petitioner's contention, the conclusion reached by the jury in this case was not the result of mere speculation. It rested on firm medical opinion and substantive facts. Faival Zaczepinski was shot in the abdomen during the course of a robbery on October 24, 1970. He was rushed to the hospital where it was necessary to perform surgery and administer 20 separate units of blood which were necessary for his survival. (T5.8-25). He remained in the hospital until November 15. On January 4, he returned to his doctor with a malady the doctor initially diagnosed as neurological. (T5.11.8). Thus Dr. Sachs sent him to Dr. Valergakis. At that time the hepatitis was not apparent and there was no jaundice. Yet, within four days when the neurologist observed defendant, the hepatitis was so well settled that jaundice was immediately evident. Within another few days, Faival Zaczepinski was dead from liver deterioration caused by hepatitis.

An understanding of the nature of the disease hepatitis is necessary to evalute the proofs. (See T5.45-1). Hepatitis is of two general classes: toxic hepatitis and viral hepatitis. The former is caused by various poisons or drugs and is non-communicable. Viral hepatitis is caused by a virus and is divided into two categories: infectious and serum hepatitis. Infectious has an incubation period of four to six weeks and is generally transmitted orally. Serum hepatitis, which has an incubation period of from six weeks to eight months, is transmitted only by the introduction of the virus into the blood stream. The disease is so virulent that the introduction of 1/40,000 of a cc of virus-bearing plasma into the blood is sufficient to cause infection. See generally, *State v. Weiner*, 41 *N.J.* 21, 23, 42, 194 *A.2d.* 467 (1963).

Faced with the extremely fulminant nature of the disease which resulted in the instant fatality, there was little difficulty in diagnosing it as serum viral hepatitis. (T5.54-1). The fact that the

incubation period of serum hepatitis corresponds with the period of time between the transfusions and the appearance of symptoms confirms and reinforces that diagnosis. (T5.49-12). Moreover, as testified to by Dr. Albano, infectious hepatitis is an extreme rarity in persons of decedent's age. Added to this is the fact that serum viral hepatitis can be contracted only through direct introduction into the blood stream. Indeed, there is an improportionate risk of such virus being contained in blood utilized in transfusions. (T5.14-10).

As noted in the Counter-Statement of the Case, four medical experts testified at trial on behalf of the State, and each of these witnesses opined that the victim died as a result of serum hepatitis contracted from the transfusions administered on October 24, 1970. (T5.22-19; T5.53-18; T7.27-3; T10.10.6). Such medical testimony is more than sufficient to permit the issue to go to the jury. *Cf. People v. Arnold*, 89 *Ill.* App. 2*d.* 185, 232 *N.E.2d.* 483 (App.Ct. 1967). See also *Mason v. Comm.* 423 *S.W.2d.* 532 (*Ky.* 1968), *Comm. v. Webb*, 296 *A.2d.* 734 (*Penn.* 1972); *Comm. v. Maroney*, 415 *Pa.* 553, 204 *A.2d.* 459 (1964); *Comm. v. Chester*, 410 *Pa.* 45, 188 *A.2d.* 323 (1963); *Antwine v. State*, 486 *S.W.* 2*d.* 578 (Tex. Ct. Crim. App. 1972); *State v. Little*, 358 *P.2d.* 120 (*Wash.* 1961).

Moreover, there is no reasonable hypothesis arising from the facts consistent with defendant's innocence. It was not necessary for the State to disprove every other conceivable source for the disease; the proper issue was simply whether the evidence, viewed in it entirety including the legitimate inferences therefrom, was sufficient to enable the jury to find the State's charge was established beyond a reasonable doubt. *State v. Mayberry*, 52 *N.J.* 413, 436, 245 *A.2d.* 481 (1968), *cert.* denied 393 *U.S.* 1043 (1969). See *Holland v. United States*, 348 *U.S.* 121 (1954); *United States v. Brown*, 436 *F.2d.* 702 (9th Cir. 1970); *McFarland v. United States*, 273 *F.2d.* 417 (5th Cir. 1960). The theory, as advanced by the State, is logically inferrable from the facts and the medical opinion postulated by the four doctors who testified for the State and is supported by reason and the substantive facts. In light of such factors, the court made no error in denying the defendant's motion for judgment of acquittal.

POINT II

THE SENTENCING SCHEME OF N.J.S.A. 2A:113-3 AND 113-4 IS CONSTITUTIONAL

Prior to the decisions in *United States v. Jackson*, 390 *U.S.* 570 (1968) and *Funicello v. New Jersey*, 403 *U.S.* 876 (1971), punishment for conviction of murder in New Jersey was governed entirely by statute.[2] Under New Jersey's statutory scheme of capital punishment, a defendant who wished to avoid the possibility of a sentence of death could, with the permission of court, enter a plea of *non vult* to the indictment and be subject to a sentence of either life imprisonment (the penalty for murder in the first degree) or

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2. This prosecutorial scheme is set out in *N.J.S.* 4. 2A:113-3 and 2A:113- 4:

> 2A:113-3. "In no case shall the plea of guilty be received upon any indictment for murder, and if, upon arraignment, such plea is offered, it shall be disregarded, and the plea of not guilty entered, and a jury, duly impaneled, shall try the case.
>
> "Nothing therein contained shall prevent the accused from pleading *non vult* or *nolo contendere* to the indictment; the sentence to be imposed, if such plea be accepted, shall be either imprisonment for life or the same as that imposed upon a conviction of murder in the second degree."
>
> 2A:113-4. "Every person convicted of murder in the first degree, his aiders, abettors, counselors and procurers, shall suffer death unless the jury shall by its verdict, and as a part thereof, upon and after the consideration of all the evidence, recommend life imprisonment, in which case this and no greater punishment shall be imposed.
>
> "Every person convicted of murder in the second degree shall suffer imprisonment for not more than 30 years."

imprisonment up to thirty years (the penalty for murder in the second degree). Thus, just as in *Jackson*, the prior statute mandated different treatment as public policy.

In *State v. Funicello*, 60 *N.J.* 60, 286 *A.2d* 55 (1972), the New Jersey Supreme Court held that, in light of the memorandum decision in *Funicello v. New Jersey*, *supra*, it must be concluded that the New Jersey statute violated constitutional provisions as interpreted in *Jackson*. Consequently, the New Jersey court set aside the death penalty in *Funicello* but retained the remainder of the statutory scheme, resentencing Funicello and the other appellants to life imprisonment, *nunc pro tunc*, as of the date the death sentence was initially imposed. The court also stated,

> "A life sentence heretofore imposed upon a jury's recommendation or upon the State's waiver of the death peanlty is unaffected. See *Robinson v. United States*, 394 F.2d 823 (6 Cir. 1968), *cert.* denied, 393 *U.S.* 1057, 89 *S. Ct.* 698, 21 *L. Ed. 2d* 698 (1969); *Parker v. United States*, 400 *F.2D.* 248 (9 Cir. 1968), *cert.* denied 393 *U.S.* 1097, 89 *S. Ct.* 892, 21 *L. Ed.* 2*d* 789 (1969).
>
> "Neither a *non vult* plea nor a judgment heretofore entered upon it will be impaired by our action today. As to any claim of involuntariness in the plea, the governing principles are set forth in *Brady v. United United States*, 397 *U.S.* 742, 90 *S. Ct.* 1463, 25 *L. Ed.* 2*d* 747 (1970); *Parker v. North Carolina*, 397 *U.S.* 790, 90 *S. Ct.* 1458, 25 *L. Ed.* 2*d* 785 (1970); *North Carolina v. Alford*, 400 *U.S.* 25, 91 *S. Ct.* 160, 27 *L. Ed.* 2*d* 162 (1970).
>
> All pending and future indictments for murder shall be prosecuted on the basis that upon a jury's verdict of murder in the first degree, the penalty shall be life imprisonment. Pleas to an indictment for murder shall continue to be governed by *N.J.S.A.* 2A:113-3." (60 *N.J.* at 68).

In the instant case, petitioner contends that the sentencing scheme embodied in *N.J.S. A.* 2A:113-3 and 113-4 still imposes an unconstitutional penalty on a defendant for asserting his right to go to trial, even in the absence of the death penalty. He observes that a person who pleads *non vult* to a short form indictment under the general murder statute can be sentenced under either the first or second degree punishment provisions of the statutes while a defendant who goes to trial under such a charge and is found guilty by a jury of first degree murder must be sentenced to a mandatory term of life imprisonment. He concludes that a judge sentencing a defendant who pleads *non vult* to a murder charge has the "discretion" to sentence him as a second degree offender to a lesser term of punishment. Analogizing this situation to *Jackson* and *Funicello*, petitioner argues that this "inequitable" sentencing scheme places a premium on the right to a jury trial and has a chilling effect on the exercise of that constitutional right. In essence, defendant is complaining because his codefendant entered into a plea bargain and received a lesser sentence.

The State of New Jersey submits that petitioner's argument ignores the fact that a defendant pleading *non vult* to the short form indictment may also be sentenced as a first degree offender to life imprisonment. Under the statutory scheme, the judge merely assumes the function of the jury in a case where the pleading of defendant waives a jury trial, and the judge makes a factual determination of the degree of the offense. The statute does not make this determination discretionary, but it does substitute the judge for the jury in the function of determining the degree of guilt. This traditional function of the fact finder permits the assessment of mitigating factors and the introduction of leniency in the appropriate case. In essence, then, the statute does not mandate different treatment as was the case with the death penalty under the federal kidnapping act or under the former New Jersey law. Now, a defendant charged with murder faces the same alternatives whether he pleads *non vult* or demands a jury trial. In the former instance it is the judge who must determine whether the facts as presented mandate a first or second degree

determination.[3] If a defendant chooses to go to trial he merely exercises his right to have the jury determine guilt or innocence and then whether the facts mandate a finding of first or second degree or alleviation to manslaughter. A defendant is in no way penalized for exercising his right to a jury trial since the alternatives remain essentially the same. Accord, *State v. Land*, 124 *N.J. Super. 303 (1973); State v. Hubbard*, 123 *N.J. Super.* 345, 303 *A.2d* 87 (1973), certif. denied 63 *N.J.* 325 (1973). Whether he is convicted by jury or by judge after plea, once the degree of guilt is determined he is subject to the same considerations: if it is first degree murder he receives a mandatory life sentence; if it is second degree murder, he is treated as an individual and sentenced accordingly. New Jersey deals with each second degree offender as we reach him, taking into consideration mitigating factors.

Petitioner's reliance on *United States v. Jackson, supra,* is misplaced. In *Jackson* this Court invalidated the federal kidnapping act, emphasizing the fact that "defendant's assertion of the right to jury trial may cost him his life, for the federal statute authorizes the jury - and only the jury - to return a verdict of death." 390 *U.S.* at 572. As noted, what distinguishes the situation in this case is that petitioner faced the same possible sentencing results whether he pled guilty or went to trial. Furthermore, it is implicit in the reasoning of the Court in *Jackson* that the sanction of execution is *sui generis.* Constitutional doctrines forbidding the use of execution as an encouragement for guilty pleas need not apply to cases where only differing periods of imprisonment are at stake. For example, this Court has repeatedly recognized that an otherwise valid plea is not involuntary because induced by the defendant's desire to limit the possible maximum penalty to less than that authorized if there is a jury trial. *Parker v. North*

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3. The sentencing judge has before him the transcript of the plea hearing in which the court satisfies itself there is a factual basis for the plea and a copy of the presentence report, often including the police reports and defendant's prior criminal record.

Carolina, 397 *U.S.* 790, 795 (1970); *Brady v. United States*, 397 *U.S.* 742, 752 (1970).[4] And unlike the death penalty dealt with in *Jackson*, leniency in the custodial punishment scheme permitted in connection with a plea bargain neither coerces nor "needlessly" encourages guilty pleas.

Petitioner's rationale, if taken to its logical extreme, would end plea bargaining altogether. Yet it is implicit from the decision of this court in *Jackson* that such a proposal would have a "cruel impact upon those defendants who would greatly prefer not to contest their guilt" and "would rob the criminal process of much of its flexibility." 390 *U.S.* at 584. The disposition of

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4 As this Court observed in *Brady v. United States, supra:*

"Insofar as the voluntariness of his plea is concerned, there is little to differentiate *Brady* from (1) the defendant, in a jurisdiction where the judge and jury have the same range of sentencing power, who pleads guilty because his lawyer advises him that the judge will very probably be more lenient than the jury; (2) the defendant, in a jurisdiction where the judge alone has sentencing power, who is advised by counsel that the judge is normally more lenient with defendants who plead guilty than with those who go to trial; (3) the defendant who is permitted by prosecutor and judge to plead guilty to a lesser offense included in the offense charged; and (4) the defendant who pleads guilty to certain counts with the understanding that other charges will be dropped. In each of these situations, as in Brady's case, the defendant might never plead guilty absent the possibility or certainty that the plea will result in a lesser penalty than the sentence that could be imposed after a trial and a verdict of guilty. We decline to hold, however, that a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged." (397 *U.S.* at 752).

criminal charges by agreement between the prosecutor and the accused, sometimes loosely called "plea bargaining," is an essential component of the administration of justice. Properly administered, it is to be encouraged. *Santabello* v. *New York*, 404 *U.S.* 257, 260 (1971); *Brown* v. *Beto*, 377 *F.2D* 950, 956 (5th Cir. 1967). This Court in *Brady* v. *United States*, *supra*, enumerated some of the advantages to both the State and the defendant in permitting plea bargaining and precluding the possibility of the maximum penalty authorized by law:

> "For a defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious — his exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated. For the State there are also advantages — the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can attain its burden of proof." 377 *U.S.* at 752.

It is clear that guilty pleas are not constitutionally forbidden, and as is amply demonstrated in the discussion above, the Fifth and Sixth Amendments do not reach so far as to preclude prosecutors from consenting to a guilty plea tendered by a co-defendant for a lesser included offense under the indictment. See *Newman* v. *United States*, 382 *F.2d* 479 (D.C. Cir. 1967). On the contrary, as the Circuit Court observed in *Newman*, it is not necessary that every offender be treated alike for such a concept would negate discretion. The prosecutor (and presumably the judge accepting the guilty plea and sentencing the co-defendant)

> "is expected to exercise discretion and common sense to the end that if, for example, one is a young first offender and the other older, with a criminal record, or one played a lesser and the other a dominant role, one

the instigator and the other a follower, the prosecutor can and should take such factors [and others] into account; no court has any jurisdiction to inquire into or review his decision." *Id.* at 482.

For the foregoing reasons, it is respectfully submitted that the sentencing scheme of *N.J.S.A.* 2A:113-3 and 113-4 is constitutional and that petitioner's contentions are devoid of merit.

CONCLUSION

For all the foregoing reasons, respondent, State of New Jersey, respectfully prays that the writ of certiorari sought in the above named petition pending before this Court not issue.

Respectfully submitted,

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Of Counsel and on the Brief

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-1226-71

STATE OF NEW JERSEY,
Plaintiff-Respondent,
v.
ABRAHAM FIELDS,
Defendant-Appellant.

Argued August 20, 1973 — Decided Sept. 6, '73

Before Judges Collester, Kolovsky and Carton.

On appeal from the Hudson County Court.

Mr. James K. Smith, Jr., Assistant Deputy Public Defender, argued the cause for appellant (Mr. Stanley C. Van Ness, Public Defender, attorney).

Mr. John J. Hughes, Assistant Prosecutor, argued the cause for respondent (Mr. Geoffrey Gaulkin, Hudson County Prosecutor, attorney).

PER CURIAM

Defendant Abraham Fields and Thomas Hines were jointly indicted for the murder of Faival Zaczepinski. Thereafter Hines pleaded *non vult* to the indictment and testified as a State's witness at Field's trial. Fields was found guilty by a jury of murder in the first degree and sentenced to life imprisonment. This appeal followed.

The State's case against defendant was based on the theory of a felony murder. The State's proofs showed that on October 24, 1970 at approximately 9:30 P.M. two black men wearing grey stocking masks committed an armed robbery of a delicatessen store in Jersey City. During the course of the robbery one of the men shot Faival Zaczepinski, one of the employees of the store.

Zaczepinski was taken to a hospital suffering from two gunshot wounds in his abdomen. It was necessary to give the victim blood transfusions before emergency surgery could be undertaken. During his stay at the hospital Zaczepinski received 16 pints of blood. Due to his precarious condition the bullets were never removed. He remained in the hospital until November 15, 1970 when he was released. In early January 1971 Zaczepinski developed symptoms which were diagnosed as hepatitis and he was rehospitalized. He died on January 8, 1971.

During the course of their investigation of the homicide police received information which led to the discovery of the handguns used in the robbery as well as the jackets worn by the robbers. Hines and defendant were arrested and confessions were obtained fr om each of them. Both stated that Hines shot the victim while defendant was taking money from the cash register.

Defendant first contends his motion for an acquittal should have been granted because the State failed to prove beyond a reasonable doubt that Zaczepinski's death was caused by blood transfusions administered in an attempt to save his life. He argues the victim's hepatitis may have resulted from either an infection or a stab wound he received 20 days before the shooting. We find no merit to this contention. The test on a motion for acquittal is whether the State's evidence in its entirety, direct or circumstantial, giving the State the benefit of all its favorable testimony as well as all of the favorable inferences which reasonably could be drawn therefrom, is sufficient for a reasonable jury to find the accused guilty of the charge beyond a reasonable doubt. *State v. Reyes*, 50 *N.J.* 454, 459 (1967). Here the State's medical proofs were more than sufficient to warrant a finding that Zaczepinski died from serum hepatitis resulting from the blood transfusions necessitated by the gunshot wounds. It was not incumbent on the State to exclude every other hypothesis relating to the cause of hepatitis. See *State v. Fiorello*, 36 *N.J.* 80, 86-91 (1969). The case of *State v. Weiner*, 41 *N.J.* 21 (1963), on which defendant relies, is factually distinguishable and inapposite.

Defendant next argues the court erred in ruling that the State was not required to reveal the identity of the informer who gave the police the handgun used by defendant during the robbery and told them where the jackets worn by defendant and Hines

could be found. He contended that the informer's possession of the gun and knowledge of where the jackets had been hidden indicated the informer had intimate knowledge of the facts concerning the crime; that he should have been permitted to ascertain how and where the informer got the gun, and that the informer's testimony would be relevant and helpful to his defense.

Evidence Rule 36 provides that the identity of an informer need not be disclosed unless the court finds that the disclosure of his identity is essential to assure a fair determination of the issues. The burden of showing the need for such disclosure is on the defendant. *State v. Dolce*, 41 *N.J.* 422, 435-436 (1964). Here the identification of defendant's gun used during the robbery and the jackets worn by the robbers was established by Hines and other witnesses—in fact, defendant identified both the gun and jackets when he gave his statement to the police. The defense could offer nothing more than mere speculation of what the informer might know. See *State v. Oliver*, 50 *N.J.* 39, 42 (1967). There was no error in the court's ruling.

Defendant also contends the sentencing provisions of *N.J.S.A.* 2A:113-3 and 4 are unconstitutional because he was penalized for asserting his right to plead not guilty under the Fifth Amendment and his right to a jury trial under the Sixth Amendment. This argument has been previously rejected by this court. *State v. Hubbard*, 123 *N.J. Super.* 345 (App. Div. 1973), certif. den. 63 *N.J.* 325 (1973); *State v. Land*, 124 *N.J. Super.* 303 (App. Div. 1973).

Finally, defendant in a *pro se* brief claims his sentence should be modified to be consistent with that imposed upon the co-defendant Hines who was sentenced to a prison term of 17½ -20 years. The argument is frivolous. Defendant's sentence to life imprisonment is mandatory under *N.J.S.A.* 2A:113-4. *State v. Hubbard, supra.*

The judgment of conviction is affirmed.